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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| CHRIS NORRIS, ET AL.,<br>Plaintiffs and Respondents,<br>v.<br>NATIONSTAR MORTGAGE LLC,<br>Defendant and Appellant. | A153550<br><br>(San Francisco County<br>Super. Ct. No. CGC13534617) |

Nationstar Mortgage LLC (Nationstar) appeals from a default judgment, contending that the complaint did not allege any viable cause of action, the court erred by denying Nationstar an evidentiary hearing on respondents' quiet title claim, the judgment awarded monetary relief in excess of the amount demanded in the complaint and without support in the evidence at the prove-up hearing, and as a matter of law respondents were not entitled to an order that Nationstar had waived its security interest in their property. We will reverse the judgment.

## I. FACTS AND PROCEDURAL HISTORY

### A. The Norrises' Complaint

In October 2013, Chris and Elizabeth Norris filed a lawsuit against Nationstar for declaratory relief, fraud, breach of contract, breach of fiduciary duty, quiet title, and violation of the Rosenthal Fair Debt Collection Practices Act (Civ. Code, §§ 1788 et seq.; Rosenthal Act).

Their verified complaint alleged as follows.[1]

In March 2008, the Norrises obtained a $341,100 loan from First Horizon Home Loans (First Horizon) and used the proceeds to buy residential property at 126 Argonaut Avenue in San Francisco (Property). The Norrises signed a promissory note, agreeing to repay the loan, as well as a deed of trust securing the loan with the Property. The Norrises were to make monthly payments of $2,158.77, consisting of $2,045.07 in principal and interest plus $113.70 as an impound for private mortgage insurance (PMI).

The deed of trust named MERS as the beneficiary, as nominee for the lender and its successors. First Horizon serviced the loan for about three years and then transferred the servicing responsibilities to MetLife Home Loans.

Nationstar became the servicer of the loan in August 2011. Nationstar's first invoice indicated that the minimum monthly payment was $2,272.47—$113.70 more than the amount stated in the loan documents. After the Norrises' inquiry, Nationstar sent a revised statement indicating that $2,158.77 was the monthly amount due.

Beginning "on or about June 2012," however, Nationstar again billed the Norrises $2,272.47. When the Norrises inquired, they were told there was a higher "escrow amount" due to increased property taxes or they had missed a payment, neither of which was substantiated. The Norrises concluded that Nationstar had "created an 'escrow impound account,' contrary to the Escrow Waiver agreement," and required payment of that account one month in advance contrary to the terms of the loan agreement. As a result, Nationstar was demanding a monthly payment $113.70 higher than what was set forth in the loan documents (basically double-charging the impound), and imposed late fees for paying only $2,158.77 per month.

The Norrises spent numerous hours in the fall of 2012 discussing the situation with Nationstar. The Nationstar representatives agreed that the Norrises had made the payments required by the promissory note, but they could not correct the computer

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[1] We note that the Norrises' respondents' brief fails to comply with rule 8.204(a)(1)(C) of the California Rules of Court by omitting cites to the Appellant's Appendix after its numerous references to the complaint.

system. Meanwhile, Nationstar "harassed" them with automated collection calls, despite their protests, and failed to respond to their "qualified written requests" for information.

At some point, the Norrises had a "multi-hour conversation" with a Nationstar manager, during which the Norrises agreed to make one additional payment of $113.70 in exchange for Nationstar's assurance that the accounting issues would be solved, such that they would resume paying the $2,158.77 per month, and they would receive a credit of $113.70 upon refinance, payoff, or discontinuation of PMI. The Norrises sent the additional $113.70, but Nationstar failed to credit it to the escrow impound account. Furthermore, Nationstar did not keep the promises it had made to induce the Norrises to send the $113.70.

On December 31, 2012, the Norrises and Nationstar came to a new oral agreement, purportedly memorialized by a letter Chris Norris sent to Nationstar, which was attached to the complaint as an exhibit. The letter confirmed an arrangement by which the Norrises would be invoiced at "$9.47–$9.48 per month" until the sum of $94.74 was paid, and they would make monthly payments of $2,158.77 to keep the account current. Enclosed with the letter was a check for $4,317.54 (2 x $2,158.77) to cover amounts due through January 31, 2013. The letter authorized Nationstar to negotiate the check only if it agreed with Norris's recitation of the parties' new agreement. Nationstar negotiated the check, but failed to apply the payments as promised. Nationstar thereafter ignored the Norrises' further calls and qualified written requests, imposed improper late fees, and refused to "correct the accounting."

In August 2013, the Norrises sent Nationstar a letter stating that they "estimated the costs incurred by [them] as a result of Nationstar's improper actions exceeded $6,000.00," they were unilaterally taking a $6,000 offset against monthly payments due in August, September, and "a portion of the" October 2013 payment, and a check for the remainder of the October 2013 payment would be timely submitted. Nationstar did not respond, but increased the frequency of its collection calls despite the Norrises' requests that the calls stop.

In sum, the complaint alleged, the Norrises had paid all amounts owed through July 2013 and applied an offset against the payments due in August, September, and October 2013, the month the complaint was filed.

The prayer of the complaint requested compensatory and punitive damages "in an amount to be proven at the time of trial;" attorney fees and costs; a declaration that the Norrises owed no more than $2,158.77 per month on their loan; and a declaration that Nationstar waived its security interest in the Property.

B. Default

The Norrises did not file a proof of service on their October 2013 complaint and summons until July 2014. The proof of service was signed by an employee of the Norrises' (then) lawyer in Los Angeles, averring that he had personally served the summons and complaint on Nationstar's registered agent for service of process in Sacramento on October 3, 2013. The Norrises filed a request for entry of Nationstar's default, which was entered on July 10, 2015.

Nationstar appeared in the action in March 2017 and filed a motion for relief from the default, supported by declarations of its custodian of records and its agent for service, who denied having any record of receiving the complaint and summons. After additional briefing, a declaration from the process server, and two hearings, the court denied the motion in May 2017.

C. Default Judgment

A hearing for entry of a default judgment was set for November 16, 2017. Nationstar filed a brief asserting that no judgment could be entered because the complaint failed to state facts constituting a cause of action and did not seek a specific amount of damages, and Nationstar was entitled to an evidentiary hearing on the quiet title claim despite its default (Code Civ. Proc., § 764.010).[2] Nationstar also filed a request for

[2] Code of Civil Procedure section 764.010 provides: "The court shall examine into and determine the plaintiff's title against the claims of all the defendants. The court *shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants*,

judicial notice of documents regarding the Property. The Norrises filed a trial brief, witness list, and an exhibit list with attached exhibits, including a trustee's deed revealing that *the Property had been sold* to Breckenridge Property Fund 2016, LLC (Breckenridge) in February 2017—months before the prove-up hearing.

At the November 16 hearing, Nationstar repeated its request for an evidentiary hearing on the quiet title claim and reiterated that a monetary judgment could not be entered because the complaint neither stated a cause of action nor requested a specific amount of damages. The court continued the hearing for the Norrises to file a response. Before adjourning, the court heard testimony from a real estate broker as to the Property's value, at the Norrises' request.

Prior to the continued prove-up hearing, the Norrises filed a reply to Nationstar's brief. Nationstar filed a request for judicial notice of documents that showed what happened regarding the Property after the Norrises filed their complaint. According to these documents, MERS had assigned the beneficial interest in the Norrises' deed of trust to First Horizon in September 2013, and First Horizon assigned the beneficial interest to Nationstar in January 2014. In March 2014, a notice of default was recorded, and a notice of trustee's sale was recorded in May 2016. In June 2016, Caliber Home Loans, Inc. assumed responsibility for servicing the loan in place of Nationstar. In August 2016, Nationstar assigned the beneficial interest in the deed of trust to U.S. Bank, National Association, as Trustee for LSF9 Master Participation Trust. At the trustee's sale in February 2017, the Property was sold to Breckenridge.

At the December 28, 2017 hearing, Nationstar reiterated its entitlement to an evidentiary hearing on the Norrises' quiet title claim. The court denied the request, and when confronted again with the applicable code section, responded it was holding an evidentiary hearing but not allowing Nationstar to present witnesses. The court observed that it had taken evidence at the earlier hearing (that is, the Norrises' real estate expert),

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other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the *evidence* and the law." (Italics added. See, e.g., *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 941–943.)

the Norrises "made out a prima facie case," and the proposed judgment was "consistent with" the complaint, the evidence the court reviewed, and the testimony of the real estate broker, which "supports the requested relief." The court ordered judgment that Nationstar waived its security interest in the Property as of October 1, 2013 and awarded damages of $25,000, with attorney fees to be determined.[3] The Norrises' attorney presented the court with a declaration averring that he spent 30 hours on the case worth $12,000 in attorney fees (the declaration is not in the appellate record), and the Norrises claimed $450 in costs. The court added those sums to the judgment for a total monetary award of $37,450. Judgment was entered accordingly on December 28, 2017. This appeal followed.

## II. DISCUSSION

### A. The Complaint Alleged No Viable Cause of Action

By defaulting, a defendant admits the well-pleaded factual allegations of the complaint. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 281 (*Kim*).) Before entry of a default *judgment*, however, the trial court must make sure those factual allegations state a cause of action. (*Id*. at p. 272 [repeating this "cautionary tale" for trial courts]; *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1000, 1013–1015 [quoting California Judges Benchbook, citing decades of court decisions, and "remind[ing] trial courts that however burdened they be, they must vigilantly attend to their duty in connection with the default process, ' "to act as gatekeeper, ensuring that only the appropriate claims get through" ' "].)

Thus, although a default has been entered and the well-pleaded factual allegations are deemed true, plaintiffs proceed to a default judgment prove-up hearing at their peril. (*Kim, supra*, 201 Cal.App.4th at pp. 271–272.) The defendant may challenge the legal sufficiency of those allegations, both at the prove-up hearing and on appeal. (*Id*. at

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[3] How the court arrived at $25,000 is a mystery. That amount was not mentioned in the complaint, in the Norrises' trial brief, or at the prove-up hearings. The complaint sought damages according to proof, but there was zero proof of any alleged damages (or any basis for punitive damages) presented at the hearings.

p. 282.) "[I]f the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff's favor cannot stand." (*Ibid*.) We review de novo. (*J.W. v. Watchtower Bible & Tract Society of New York, Inc*. (2018) 29 Cal.App.5th 1142, 1162.)

1. First Count (Declaratory Relief)

To state a declaratory relief claim, the plaintiff must allege facts showing there is a dispute between the parties concerning their legal rights, constituting an "actual controversy" within the meaning of the declaratory relief statute. (Code Civ. Proc., § 1060; *Artus v. Gramercy Towers Condominium Assn.* (2018) 19 Cal.App.5th 923, 930.) Events occurring after the filing of the complaint can moot a claim for declaratory relief that was ripe and judiciable at the time suit was commenced. (*Artus*, at pp. 931–934.)

Here, the Norrises' declaratory relief claim sought a declaration that they were not required to pay more than $2,158.77 (with PMI) or $2,045.07 (without PMI) per month. They also sought "an objective valuation of the property to determine if the cancellation of the PMI requirement is appropriate."[4]

However, as shown by the evidence submitted by both the Norrises and Nationstar for the prove-up hearing, the deed of trust was foreclosed and the encumbered property was sold to Breckenridge at a trustee's sale in February 2017. As a matter of law, foreclosure of the deed of trust extinguished the Norrises' obligations under the promissory note. (Code Civ. Proc., § 580d.) Therefore, by the time the trial court entered judgment on December 28, 2017, the Norrises no longer had the loan, so there was no longer an actual controversy between the Norrises and Nationstar about the amount the Norrises owed each month or whether the Norrises needed to provide PMI.

In their respondents' brief, the Norrises concede: "Unfortunately, the principal remedies that Plaintiffs sought were *rendered moot* once Nationstar elected to transfer the

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[4] In their prayer for relief, the Norrises sought "[a] judgment declaring that Nationstar has waived any security interest in the Subject Property." This request was not included in their declaratory relief count, but was sought instead under their claim for quiet title. As discussed *post*, they were not entitled to such relief.

loan to a third party which conducted a foreclosure based upon the misinformation provided by Nationstar." (Italics added.) As a matter of law, the Norrises were not entitled to judgment on their declaratory relief claim.

2. Second Count (Fraud)

To allege a fraud claim, the plaintiff must allege that the plaintiff suffered damages proximately caused by the plaintiff's reliance on the defendant's misrepresentation. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

The Norrises' fraud count alleged that Nationstar induced them to make payments, at times in excess of the terms of the loan documents, with the false promise that the servicing problems caused by Nationstar would be corrected. They further alleged that they "would never have sent payments without Nationstar's promises that it would correct its servicing problems and start respecting the terms contained within the loan documents."

Nowhere in count two do the Norrises specifically allege that they suffered proximately-caused damage. An inference from the allegations elsewhere in their complaint—and what the Norrises contend in their respondents' brief—is that they paid $113.70 more than the proper monthly amount in reliance on Nationstar's promise to solve the accounting issues (by restoring the monthly payment amount to $2,158.77) and to later credit them $113.70.

However, the complaint also alleged that *thereafter* in August 2013, the Norrises sent a letter estimating that the costs they incurred due to Nationstar's improper actions exceeded $6,000, and they applied a $6,000 offset to the August and September 2013 payments and a portion of the October 2013 payment, in apparent satisfaction for the overpayments they had made. According to the allegations of the complaint, therefore, the Norrises were whole through October 2013, when the complaint was filed. They failed to allege proximately-caused damage.[5]

[5] By its default, Nationstar admitted the allegation that the *Norrises* estimated their costs as exceeding $6,000, not that the costs actually exceeded $6,000. In any event, the

3. Third Count (Breach of Contract)

To state a breach of contract cause of action, the plaintiff must allege a contract, the defendant's breach, the plaintiff's performance or excuse for non-performance, and damage resulting from the defendant's breach. (*People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1383.) The Norrises' third count attempts to state a cause of action based on the loan documents and two subsequent oral agreements.

*a. Breach of Loan Documents*

The Norrises alleged that Nationstar had "failed to adhere to the terms of the loan documents by imposing fees that were not authorized by the PN [Promissory Note]," namely, the $113.70 fee.

The Norrises did not, however, allege that they had performed their obligations under the loan documents or alleged facts that would excuse nonperformance. To the contrary, the allegations of the complaint assert that they stopped paying on their loan after July 2013. While they allege that their performance for August, September and part of October 2013 was excused by Nationstar's overcharges, applying their $6,000 offset still left them owing $476.13 on the October 2013 payment. (For the months of August, September and October 2013, at a monthly payment of $2,158.71, the Norrises would owe $6,476.13; this amount less the $6,000 offset would leave $476.13 owing in October 2013.) The Norrises did not allege payment of that sum.

In their respondents' brief, the Norrises assert that the $476.13 owing for October 2013 was not overdue until about 10 hours after the complaint was filed at 1:57 p.m. on October 1, 2013. But the complaint does not make that allegation or allege that the payment was made. (And no such evidence was provided at the hearing.)

In any event, the Norrises failed to allege damage from Nationstar's breach. Liberally interpreted, the complaint alleged that Nationstar's breach had caused the Norrises about $6,000 in added costs, but the Norrises had recouped the sum by offset

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complaint alleged that the $6,000 offset was to satisfy their estimated loss, without any allegations that they were owed anything else.

against payments due in August through October 2013. The Norrises alleged no other damage from Nationstar's alleged breach of the loan agreement. (See *Patent Scaffolding Co. v. William Simpson Constr. Co*. (1967) 256 Cal.App.2d 506, 511 ["A breach of contract without damage is not actionable."].)

*b. Oral Agreements*

In paragraph 68 of their complaint, the Norrises alleged that Nationstar agreed to accept $2,158.77 a month "without further attempts at modification, in exchange for the [Norrises'] deposit of $113.70." They further alleged that they paid the $113.70 but Nationstar "repudiated" the agreement.

In paragraph 69 of their complaint, the Norrises alleged that Nationstar made an agreement memorialized in the letter attached to their complaint, by which they agreed to be invoiced at "$9.47–$9.48 per month" for a certain period and enclosed a check for $4,317.54 to cover amounts past due. Nationstar allegedly "repudiated" that agreement after cashing the check.

Neither of these purported contract breaches alleged damages caused by the breach. As set forth *ante,* any such damage was self-remedied by the Norris's imposing their unilateral $6,000 offset.[6]

4. Fourth Count (Breach of Fiduciary Duty)

The entirety of the Norrises' allegations under count four is this: "70. In the Fall of 2012, Nationstar promised to hold funds in escrow for Plaintiffs' benefit; however, Nationstar redirected Plaintiffs' deposit elsewhere. [¶] 71. Nationstar commingled

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[6] Nationstar points out that an agreement to modify a mortgage, note, or deed of trust is subject to the statute of frauds. (*Secrest v. Security National Mortgage Loan Trust 2002-2* (2008) 167 Cal.App.4th 544, 552–553.) Such a contract is invalid unless it is memorialized by a writing subscribed by the party to be charged. (*Id*. at p. 552; Civ. Code, § 1624.) The Norrises' payment of $113.70 did not insulate the agreement from this requirement. (*Secrest,* 167 Cal.App.4th at p. 548.) Although the Norrises alleged that *they* memorialized the latter oral agreement in writing, they did not allege that *Nationstar* had signed the memorialization. In their respondents' brief, the Norrises do not contend the statute of frauds is inapplicable; instead, they urge that Nationstar "had to mark the endorsement block" on the back of their check to negotiate it. They cite no legal authority that merely endorsing a check satisfies the statute of frauds.

Plaintiffs' escrow funds, refused to account for said funds, and ultimately converted those funds for itself." According to respondents' brief, this refers to the additional one month of PMI payment in the amount of $113.70.

A lender or loan servicer does not assume a *fiduciary* relationship with a borrower by creating a separate escrow account for the payment of taxes or insurance or making such payments. (E.g., *Gustafson v. BAC Home Loans Servicing, LP* (C.D. Cal. 2012) 2012 U.S.Dist. Lexis 186601 at *21–24; *Hudson v. Wells Fargo Bank, N.A.* (N.D. Cal. 2011) 2011 U.S.Dist. Lexis 135301 at *16–23; *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 119.) The Norrises assert in their respondents' brief that, "[w]hile holding those funds for payment to a third party, Nationstar was in a fiduciary position to Plaintiffs." They provide no citation to legal authority.

5. Fifth Count (Quiet Title)

For their quiet title claim, the Norrises alleged that Nationstar failed to adhere to the terms of the promissory note, deed of trust, and the duty to respond to borrowers' qualified written requests, and the court "has previously exercised its power in equity to impose a waiver of a lender's security interest in real property when the lender fails to respect the requirements imposed upon lenders secured by real property," citing *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991 and *Shin v. Superior Court* (1994) 26 Cal.App.4th 542. The complaint then asks the court to "exercise its power in equity to find that Nationstar has waived its security interest in the Property."

The Norrises failed to state a cause of action to quiet title. Moreover, as a matter of law their allegations do not state any cause of action that would entitle them to the relief they sought, whether it be by declaratory relief, quiet title, or any other legal theory.

*a. Statutory Requirements*

To state a cause of action to quiet title, the complaint must allege, among other things, the adverse claims to the title of plaintiff, the date as of which the determination is sought, and a "prayer for the determination of the title of the plaintiff against the adverse claims." (Code Civ. Proc., § 761.020.)

The Norrises fail to allege that Nationstar asserted an adverse claim to the title of the Property. In paragraph 19, they allege that "[i]n or about August of 2011, Nationstar asserted that it was *the assignee of the loan*." (Italics added.) Asserting itself to be an assignee of a loan claims an interest in the *debt*, not the *title* to the real property. (*Vega v. JPMorgan Chase Bank, N.A.* (E.D. Cal. 2009) 654 F.Supp.2d 1104, 1121.)

In their respondents' brief, the Norrises argue that they "articulate Nationstar's adverse claim ([Complaint] 2:15)," apparently referring to their allegation in paragraph 6 that "Nationstar claims to be the beneficiary of a deed of trust recorded against the Property."

However, the exhibits submitted to the court for the prove-up hearing—*which the court was required by Code of Civil Procedure section 764.010 to examine and consider*—showed that Nationstar held no adverse claim to title either at the time the Norrises made their allegations or at the time of the prove-up hearing. When the Norrises filed their complaint in October 2013, First Horizon was the beneficiary of the deed of trust. At the time of the prove-up hearing, the Property had been conveyed to Breckenridge. As a matter of law, at the time of judgment Nationstar had no adverse claim to title, so no quiet title claim could be brought against it. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010.)

The complaint whiffed on the last two elements of a quiet title claim as well. It did not allege a date as of which the Norrises sought to quiet title. Nor did it seek "the determination of the title of the plaintiff against the adverse claims." (Code Civ. Proc., § 761.020(e).) Instead, the complaint prayed for "[a] judgment declaring that Nationstar has waived any security interest in the Subject Property," which, as discussed *post*, could not be granted on the facts alleged.

*b. The Norrises Did Not Allege Tender*

A borrower may not quiet title against a secured lender without first paying, or tendering, the outstanding debt on which the mortgage or deed of trust is based. (*Leuras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86; accord *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1280; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112–113.) Here, the complaint did not allege that the Norrises tendered repayment of the loan, offered to tender, or had a lawful excuse for not tendering. The Norrises provide no response in their respondents' brief.

*c. No Entitlement to Waiver of Security Interest*

Finally, the allegations of the complaint did not support a declaration that Nationstar had waived its security interest in the Property.

First, equitable relief cannot be awarded where, as here, a breach of contract claim would provide the Norrises an adequate legal remedy for any harm they suffered (if they had proved any) as a result of Nationstar's purported breach of the loan agreement. (*Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 834.)

Second, eliminating Nationstar's security interest as of October 1, 2013, before Nationstar ever obtained a security interest—as demonstrated by the exhibits proffered to the court—simply makes no sense.

Third, neither the allegations of the complaint nor any proof presented at the hearing asserted any wrongdoing by Nationstar during the time that it held its security interest (January 2014–August 2016). What *did* happen during that period was the Norrises defaulted on their loan.

Fourth, wiping out Nationstar's security for a $341,100 loan because, as a loan servicer in 2012 and 2013, it had billed $113.70 a month more than the loan documents had provided for impounds, works a forfeiture and is patently inequitable. The cases on which the Norrises relied are inapposite. In *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991 and *Shin v. Superior Court* (1994) 26 Cal.App.4th 542, the creditor had violated the "one form of action" or "security first" rule (Code Civ. Proc., § 726) by trying to collect on a real estate-secured loan from the borrower's unpledged property—

funds in the borrower's bank account or prejudgment attachment against other assets—without first seeking to foreclose its security interest. (*Security Pacific*, at pp. 1001–1002; *Shin*, at pp. 547–549.) Nothing remotely like that happened here.

Fifth, the Norrises had not joined as defendants either the last owner of their loan or the party that bought their property. Both were indispensable parties, because the judgment would impair or impede their ability to protect their interests. (Code Civ. Proc., § 389, subd. (a).) Any declaration that Nationstar had waived the security interest created by the Norrises' deed of trust would impair the loan owner's interest before foreclosure and the buyer's interest thereafter. (See *Simonelli v. City of Carmel-By-The-Sea* (2015) 240 Cal.App.4th 480, 485.) The Norrises' respondents' brief offers no retort.

6. Sixth Count (Rosenthal Act)

Lastly, the Norrises alleged that Nationstar's use of "frequent automated collection calls, despite knowing that these collection calls would not resolve the underlying dispute," and its use of "frequent collection calls made by representatives that had no authority to correct Defendant's accounting, despite knowing that these collection calls would not resolve the underlying dispute," were "unreasonable and constituted harassment." Other allegations in the complaint assert that "multiple automated calls" were made to the Norrises on August 22, 2013, as well as "daily automated calls from August 23 through August 27, 2013" and August 28, 2013.

Daily telephone calls made to the debtor's home telephone number do not constitute "harassment" under the Rosenthal Act unless the calls are made at inconvenient hours, which was not alleged here. (See *Arteaga v. Asset Acceptance, LLC* (E.D. Cal. 2010) 733 F.Supp.2d 1218, 1227–1229.) Although the Norrises alleged one day of multiple automated calls, they provide no authority that such calls, under the facts alleged, violate the Rosenthal Act. (Civ. Code, § 1788.11, subd. (e) [prohibiting telephone calls "with such frequency as to be unreasonable and to constitute an harassment to the debtor under the circumstances"]; *Hinderstein v. Advanced Call Center Techs.* (C.D. Cal. 2017) 2017 U.S. Dist. Lexis 27267.) The Rosenthal Act does not

require a debt collector to assign collection calls to personnel authorized to correct accounting issues. (See Civ. Code, §§ 1788.10–1788.18; 15 U.S.C. §§ 1692b, 1692j.)

In their respondents' brief, the Norrises assert that Nationstar "repeatedly violated the Rosenthal Act hundreds of times prior to Plaintiffs filing of the complaint, and Nationstar continued to make repeated violations thereafter," even after being notified that the Norrises were represented by counsel, and that Nationstar's calls "were received well outside of acceptable hours." Their assertions are improper: there was no such allegation in their verified complaint, and they cite to no supporting evidence in the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

In sum, the allegations of the Norrises' complaint did not state any of the causes of action they purported, and the Norrises never asserted that the allegations stated any other cause of action.[7] We also note there was no legal basis for declaring that Nationstar had waived its security interest, and the award of damages exceeded the prayer of the complaint and was not supported by the complaint's allegations or the evidence. Indeed, even if the allegations of the complaint had stated a cause of action, the Norrises did not establish any damages or entitlement to any relief. We will therefore reverse the judgment (including, of course, the order granting attorney fees and costs).

## III. DISPOSITION

The judgment is reversed.

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[7] It was not alleged, and no evidence was presented, that Nationstar's purported wrongdoing led to the Norrises' default on the loan and the subsequent foreclosure. In their respondents' brief, the Norrises contend they pleaded violations of the Real Estate Settlement Procedures Act (RESPA, 12 U.S.C. § 2601 et seq.) in a paragraph that alleged, "Nationstar failed to make a good faith effort to resolve the issues raised by Plaintiffs' qualified written requests" on nine dates. No RESPA cause of action was identified in the complaint or at the prove-up hearing, and the Norrises' allegation is too conclusory and incomplete to state one. (See 12 U.S.C. § 2605(e), (f) [actual damages and, in some circumstances, statutory penalties where loan servicer fails to respond within five days, and take action or provide a substantive response within 30 days, to certain types of written correspondence].)

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.